

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Civil Action No. 2:23-CV-0039/QWT

Judge Qwerty

JONATHAN L. “ACIDRAPPS” FRANKFURTER-
COCHRAN,

v.

THE FEDERAL BUREAU OF
INVESTIGATION

Defendant

**ORDER AND OPINION ON MOTION TO DISMISS BY JOINT
STIPULATION**

The plaintiff appeared *pro se*.

Hood Tact, *Esq.*, U.S. Attorney-General, U.S. Department of
Justice, for the defendant.

Plaintiff alleges that, on the 13th of December 2023, he parked his car near the Canton Federal Building, Boulder County, Colorado, and was victim of a motor vehicle theft. He claims next to have discharged a firearm in order to “protect his castle”, at which point he was arrested by a special agent, BLOOXXED, working for the defendant. He brings in the case at bar a *Bivens* action challenging his imprisonment and seeking damages, to the sum total under the various causes of action of \$16,000 in compensatory damages and \$5,000 in punitive damages. The defendant, through the Attorney General of the United States, eventually appeared around 16:50 UTC

on the 16th December 2023 and soon thereafter the court was informed that the parties had come to a settlement agreement. [Link](#). The key provisions of the agreement are that the government is to pay the defendant an amount of compensation, \$ 1,342, and that the plaintiff's arrest record be expunged. On the basis of this stipulation, the parties seek that the action be dismissed under Fed. R. Civ. P. 41(a)(1)(A)(ii), presumably with a reservation of jurisdiction over enforcement. Because the issues here are open and shut in nature, we will endeavour to be brief.

We raised our core concerns – the sovereign immunity issue and the extend of our expungement power – with these jurisdictional issues with the parties as soon as we could, although by then the parties had already reached a settlement agreement. Neither party expressed any interest in litigating the jurisdictional questions, but “[a]lthough neither party has raised [these issues], we have a duty to do so *sua sponte* when we notice a substantial question regarding our jurisdiction.” *Columbian Financial Corp. v. Bancinsure, Inc.*, 650 F.3d 1372, 1375-76 (10th Cir. 2011). Unfortunately, we accept that in doing so, the parties will find themselves redirecting their displeasure not at each other or at the alleged tortfeasor but instead at this Court, but throughout the history of our Republic the Supreme Court, and others, instruct us that “[i]t is not for judges to listen to the voice of persuasive eloquence, or popular appeal.” *Dartmouth College v. Woodward*, 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629 (1819), and that “it is the business of judges to be indifferent to popularity” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 459, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (quoting *Chisom v. Roemer*, 501 U.S. 380, 401, n. 29, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991)). Here, because we have no jurisdiction, the only way we could

accede to the parties wishes would be to offend the very duty and province of this Court.

A

We must begin our analysis of this order through the prism of this court's jurisdiction. We note that if we enter a dismissal under the joint stipulation, we will have no jurisdiction to enforce it. To be sure, we cannot doubt that normally, "[a] trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *Farmer v. Banco Popular of N. Am.*, 557 F. App'x 762, 10 (10th Cir. 2014) (internal quotation marks omitted) (quoting *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004)). In *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), however, "the Supreme Court explained that ancillary jurisdiction does not extend to a breach of a settlement agreement that arose from a stipulation of dismissal ... which did not reserve jurisdiction to the district court to enforce the agreement or even refer to the settlement agreement." *Atlas Biologicals, Inc. v. Kutrubes*, 50 F.4th 1307, 1319 (10th Cir. 2022). The jurisdiction of this court to enforce a settlement therefore is dependent on one of two things – either "a district court can retain jurisdiction over a settlement agreement if the order of dismissal shows an intent to retain jurisdiction or incorporates the settlement agreement" *Floyd v. Ortiz*, 300 F.3d 1223, 1227 n.3 (10th Cir. 2002) (internal quotation marks omitted) (quoting *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994)), or if "some independent basis for [subject-matter] jurisdiction exists" *Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1274 (10th Cir. 2012) (citing *Kokkonen*, 511 U.S., at 382, 114 S.Ct. 1673). See generally *Farmer v. Banco Popular American*, 791 F.3d

1246, 1254 (10th Cir. 2015) (Summarising *Kokkonen* as “holding that where a case is voluntarily dismissed and the order of dismissal fails to mandate the parties’ compliance with the settlement agreement, the district court, absent an independent basis for exercising jurisdiction, lacks jurisdiction to enforce the agreement”). We cannot, unsurprisingly, “reserve” jurisdiction when we never had jurisdiction in the first place, however, since “[a] court may not . . . exercise authority over a case for which it does not have subject matter jurisdiction” *Cunningham v. BHP Petroleum Great Britain PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005) (quoting *Brown v. Francis*, 75 F.3d 860, 864 (3d Cir. 1996)), and “once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue” *Id.* (quoting *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999)) accord *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1168 (10th Cir. 2004) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”) (quoting *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 19 L.Ed. 264 (1868)). The contrary position, that somehow the fact that a settlement reached in a jurisdictionally defective action will enlarge the court’s jurisdiction to enforce relief in an action it cannot cognise in the first place, violates the principle that “[n]o action of the parties can confer subject-matter jurisdiction upon a federal court.” *Prier v. Steed*, 456 F.3d 1209, 1214 (10th Cir. 2006) (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)), nor can sovereign immunity be waived by the Attorney General since “[t]he United States is immune from suit unless Congress has expressly waived its sovereign immunity”

High Lonesome Ranch, LLC v. Board of County Commissioners of Garfield, 61 F.4th 1225, 1237 (10th Cir. 2023) (emphasis added), *cf. Shaw v. United States*, 213 F.3d 545, 549 n.5 (10th Cir. 2000) (“[N]either the government's attorneys nor any other officer of the United States may waive the United States' sovereign immunity”) (quoting *United States v. Richman (In re Talbot)*, 124 F.3d 1201, 1205 (10th Cir. 1997))

As we have explained, we doubt that we have jurisdiction. As observed, this action is a *Bivens* action. Along with its brother applicable to state officers, 42 U.S.C. § 1983, is a “private action for damages against federal officers who violate certain constitutional rights” *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). It is well known and understood however that “[t]he United States and its agencies are not subject to suit under *Bivens*” *Carter v. United States*, 389 F. App'x 809, 813 (10th Cir. 2010) (quoting *Dahn v. United States*, 127 F.3d 1249, 1254 (10th Cir. 1997)), *accord Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003) (“[A] *Bivens* claim cannot be brought against the BOP, as a federal agency, or the other defendants in their official capacities”) (citing *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir.2001)), and this Circuit has serially recited that “[t]he defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable” *Pueblo Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015) (quoting *Normandy Apartments, Ltd. v. United States Dep't of Hous. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir.2009)), meaning that, unfortunately, the only outcome of a badly construed *Bivens* action is ultimately its dismissal.

The correct vehicle for seeking relief against the United States or its agencies would be the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* As this Court explained in *Auditors of America v. United States*, 2 AA.Dig. ____, 2:23-CV-0023/QWT, slip op. at 36-37 (D. Colo. 8th Oct. 2023), under the FTCA, the plaintiff must first seek an administrative remedy, and only afterwards may he bring a claim in court. 28 U.S.C. § 2675. We cannot waive or soften that requirement for him as it goes, as well, to jurisdiction of this Court, *Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2016) (“This exhaustion requirement is ‘jurisdictional and cannot be waived.’”) (quoting *Bradley v. United States by Veterans Admin.*, 951 F.2d 268, 270 (10th Cir.1991)), and to make life worse for the plaintiff at bar and other plaintiffs like him, “[a] decision to sue the government, however, affects the availability of a *Bivens* action against the federal officer.” *Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994). See 28 U.S.C. § 2676. But, critically, the Supreme Court has explained, affirming 6th Circuit doctrine that a dismissal on purely jurisdictional grounds, *Simmons v. Himmelreich*, 578 U.S. 621, 136 S.Ct. 1843, 195 L.Ed.2d 106 (2016), “signals merely that the United States cannot be liable for a particular claim [with] no logical bearing on whether an employee can be held liable instead” 578 U.S., at 630, 136 S.Ct. 1843 accord *Pesnell v. Arsenault*, 490 F.3d 1158, 1161 (9th Cir. 2007), and so does not trigger the judgment bar. The Supreme Court subsequently clarified however that the judgment bar applies to any dismissal which touches upon the merits, *Brownback v. King*, — U.S. —, 141 S. Ct. 740, 749-50, 209 L.Ed.2d 33 (2021), regardless of whether, as is often the case, the merits decision, such as failure to state a claim, is *also* jurisdictional as it often is in FTCA claims. To put it another way, the two classes are not mutually exclusive, and a subject-matter jurisdiction dismissal is also capable of being a merits dismissal

causing for the judgment bar to operate. Lastly, we think largely that *Auditors* was wrongly decided in subsequently embarking, having arrived more or less at the same place as us today, in joining the correct defendants to the action, since we must never forget that “cannot hope to benefit from our interpretation to save his suit by reading it as one” *In re Gaviria*, 2 A.A. Dig. ____, CO:23-EX-0001/QWT, at para. 24 (Colo. Cty. Ct. 2023) in the correct form, and we can find no authority for the proposition that the cumulative effect of a recasting of an action against an agency as a *Bivens* action and the subsequent joinder of completely different defendants – tantamount in effect to creating a new action for the plaintiff, and we find no authority to support such an approach.

We do not of course intend to disparage the attempts at settlement reached by the parties. We have discussed at length the virtues of parties being able to resolve their differences without engaging in protracted litigation, and nothing in this order allows us to impugn the validity of a private treaty between the DOJ and the plaintiff, nor preclude a later, separate action, expressly discussed in *Kokkonen* and its progeny for breach of contract in enforcement of the agreement. This Court simply cannot be that forum.

B

There is, however, a second part to the action which raises different questions. Whilst sovereign immunity undoubtedly bars the monetary claim, Congress, through the APA, has “waive[ed] sovereign immunity in most suits for nonmonetary relief against the United States, its agencies, and its officers” *Robbins v. U.S. Bureau of Land Management*, 438 F.3d 1074, 1080 (10th Cir. 2006) (quoting in part *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir.

2005)) (internal quotation marks omitted), *cf.* 5 U.S.C. § 702. Under the APA, “a claim that an agency ... acted or failed to act ... under color of legal authority” *Maehr v. United States Dep’t of State*, 5 F.4th 1100, 1106 (10th Cir. 2021) (alterations in original) (quotation omitted) can be brought. This then leads to the second, more significant question of what the desired expunction actually is. This is where several complications arise.

In order to understand how, if at all, the expunction the nature, and extent, of our expunction power. When the parties were asked regarding this issue, they suggested to us that this power is derived from G.M.D. § 1.09. Several issues are presented here for our consideration. First, there is that of its applicability to Federal records in the first place, and secondly, even assuming that it does, whether it provides an independent source of authority to grant such relief in cases such as this.

It is common ground that G.M.D. § 1.09 refers to expunction of records “accumulated within Boulder County, State of Colorado”. This logically begs the question of whether Federal records, like here, can actually be expunged by this Court. This Court has previously held that the authoritative value of G.M.Ds cannot reasonably be questioned, *Artist v. Rubio*, 1 AA.Dig. 15, 17 (D. Colo. 2023), but even so, as the *Rubio* court has explained, a G.M.D. is inevitably subject to the normal rules of statutory construction – the contrary position would in fact be unworkable, since every application of a rule, lest each and every proceeding be halted by the mere mention of the initialism “G.M.D.”, inevitably involves on some level its interpretation and construction. “As in all cases requiring statutory construction, ‘we begin with the plain language of the law.’” *Levorsen v. Octapharma*

Plasma, Inc., 828 F.3d 1227, 1231 (10th Cir. 2016) (quoting *St. Charles Inv. Co. v. Comm'r*, 232 F.3d 773, 776 (10th Cir. 2000)), and we will inevitably construct legislation or quasi-legislation like a G.M.D. “give meaning to every word used in a statute, on the assumption that Congress would not have included superfluous language.” *Nelson v. United States*, 40 F.4th 1105, 1115 (10th Cir. 2022) (quoting in part *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1039 (10th Cir. 2006)) (internal quotation marks omitted). See also *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1183 (10th Cir. 2020) (Courts will “give effect to every word of a statute wherever possible”) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)). It is well understood that “[a] statute is to be considered in all its parts when construing any one of them.” *Houghton ex Rel. Houghton v. Reinertson*, 382 F.3d 1162, 1170 (10th Cir. 2004) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes Lerach*, 523 U.S. 26, 36, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998)), see also *Urban by and Through Urban v. King*, 43 F.3d 523, 526 (10th Cir. 1994) (“[W]e must read a statute as a whole to understand its context.”).

Here we do not think that G.M.D. § 1-09 authorises Federal expunctions. It is a fundamental tenet of our Constitution that, as a general rule, “[t]he States are separate and independent sovereigns” of the Federal government, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). As such, “[t]he Constitution contemplates the independent exercise by the [Federal] nation and the State, severally, of their constitutional powers.” *Snyder v. Bettman*, 190 U.S. 249, 255, 23 S.Ct. 803, 47 L.Ed. 1035 (1903). Instead, “[w]e have been instructed that there is a presumption against preemption, and that preemption will not lie unless it is the clear and manifest purpose of Congress.” *Armijo v. Atchison, Topeka &*

Santa Fe Railway Co., 19 F.3d 547, 551 (10th Cir. 1994) (quotation omitted), that is to say that “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress” *N.C. State Bd. of Dental Examiners v. Fed. Trade Comm’n*, 574 U.S. 494, 519, 135 S. Ct. 1101, 1119 (2015) (alteration in original). The inverse, that State law may not normally interfere with Federal functions is *a fortiori* true, for “the Supremacy Clause ... immunizes all federal functions from limitations or control by the states.” *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 938 (10th Cir. 2019) (citing *Hancock v. Train*, 426 U.S. 167, 178-79, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976)). To be most perspicaciously certain, G.M.Ds can, and do, transcend these constitutional limits, and we do not doubt their power to do so – G.M.D. § 1-05 for instance makes provision for legislative proceedings which, upon a reading of the Rulemaking Clause, U.S. Const. Art. I § 5 cl. 2, would likely be unconstitutional. Basic canons of interpretation, and the wise words of prudence, however, instruct us not to take such a reading lightly, and to apply constitutional avoidance, which mandates that “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ ... we are obligated to construe the statute to avoid such problems” *Thoung v. United States*, 913 F.3d 999, 1009 (10th Cir. 2019) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299–300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)) (alterations in original), and, similarly, we must be wary of interpreting G.M.Ds in any way other than that which is in accordance with the role and duty of its drafters. Taking a step back, and looking as is usual with

statutory interpretation exercises to the context of the Memorandum as a whole, we see that the text demonstrates a strong commitment to those principles of federalism which we have enunciated – G.M.D. § 1-13 expressly announces the preservation of the distinction between Federal and State law enforcement, whilst § 1-08 specifically provides for the joint and dual exercise of State and Federal jurisdiction by the same judges. Had the Memorandum’s drafters contemplated unitary application and government as the rule, and federalism as the exception, there would have been no need for § 1-08, for it would have been implicit and inherent to the government, and likewise, there would have been no § 1-13 expressly requiring a separation of laws and government. This view is, in fact, we think, reinforced throughout the Memorandum – in each section contemplated as applying both to the Federal and state governments, the drafters appear to have employed the language of “any” or “all”, cf. § 1-01 (“The FEC shall operate autonomously from *any* player government”), § 1-02 (“*Any* peace officer... *any* player government”), § 1-04 (“Members of *any* legislative body”), § 1-05 (“*Any* legislative body”), § 1-11 (“*Any* department or agency undertaking”) (emphasis added). In fact, further reinforcing this view, we think, is the explicit reference to “State of Colorado” – it appears in no other place within the memorandum, and as we explained *supra*, “[w]hen construing a statute, we should give effect, if possible, to every clause and word” *United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017) (quoting *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006)). That is to say that we must not assume that the drafter of a rule, directive, or statute intended to “waste words” *United States v. Cabot*, 10 U.S. 33, 42 (nU.S. 2020) (quoting *British v. Ozzymen*, 3 U. S. 60, 66 (nU.S. 2017)). We deduce from these provisions

a distinct exclusion of federal records from the ambit of G.M.D. § 1-09 expunctions.

Nevertheless, we need not resolve that issue fully conclusively, however, since even if we accept *arguendo* that G.M.D. § 1-09 does indeed extend to federal records, we arrive in broadly the same position as if we did not. With respect to Class IV expunctions, the variety sought by the plaintiff at bar, G.M.D. § 1-09 provides in operative part:

Class IV expungements shall apply to standard records that have been determined for removal *in a court proceeding*, such as in a civil suit for false imprisonment, where the removal of the record is *part of the relief awarded* to the petitioner. The process will be in line with *standard judicial procedure* for the removal of wrongfully issued records.

(Emphasis added). Federal courts have often explained that they are of limited jurisdiction, and that “[e]nlargement of the remedies available to the courts does not expand their jurisdiction.” *Utah Animal Rights v. Salt Lake City Corp.*, 371 F.3d 1248, 1266 (10th Cir. 2004). For instance, our Circuit (and others) have repeatedly held that “[t]he federal declaratory judgment statute [28 U.S.C. § 2201] alone does not provide jurisdiction,” *Kutrubes*, 50 F.4th, at 1327, see also *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1067 (10th Cir. 2019) (“[T]he Declaratory Judgment Act does not extend the jurisdiction of federal courts”), *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1202 (10th Cir. 2012) (“[T]he Declaratory Judgment Act does not confer jurisdiction upon federal courts, so the power to issue declaratory judgments must lie in some independent

basis of jurisdiction.”) (quoting in part *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 964 (10th Cir.1996)) (internal quotation marks omitted), *Hill v. Warsewa*, 947 F.3d 1305, 1312 (10th Cir. 2020) (Holding that “claims for declaratory judgments are subject to constitutional restraints on jurisdiction”). Similarly, we have held that other general relief statutes, like the All Writs Act, do not extend our jurisdiction. “The relevant portion of the All Writs Act provides: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law.”” *Rawlins v. Kansas*, 714 F.3d 1189, 1195 (10th Cir. 2013) (emphasis added). As the Supreme Court has explained, “[t]he power to issue relief depends upon, rather than enlarges, a court's jurisdiction.” *United States v. Denedo*, 556 U.S. 904, 912, 129 S.Ct. 2213, 173 L.Ed.2d 1235 (2009), and that same court has made it perfectly clear that the AWA is not “an independent grant of ... jurisdiction” *Clinton v. Goldsmith*, 526 U.S. 529, 535, 119 S.Ct. 1538, 143 L.Ed.2d 720 (1999) (quoting 16 Wright & Miller § 3932 (2d ed.1996)). It is clear to this court, that even though it does not use the “magic word” *United States v. McGaughy*, 670 F.3d 1149, 1156 (10th Cir. 2012) of jurisdiction, the provisions of G.M.D. § 1-09 are not intended as conferring, even assuming *arguendo* they apply to federal records, upon Federal courts some additional basis of jurisdiction, or contemplated as creating a new cause of action, but simply reaffirming – and we note that this is not mere surplusage, for several circuits deny that they have the power to expunge, see *infra* – the power of the Court to grant an expunction where “standard judicial procedure” allows it.

None of that is to say, however, that, in this circuit at least, an expunction can never be granted. Especially since *Kokkonen*, there is

an something of a circuit split on the extent of the expungement power, since there is “no statutory grant of jurisdiction to the district court to order expungement of a criminal conviction” *Tokoph v. United States*, 774 F.3d 1300, 1305 (10th Cir. 2015), or indeed to order expungement of an arrest record. In this Circuit, “[i]t is well settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances.” *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1234 (10th Cir. 2001) (citing *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993)). This Circuit has explained however that “there is a large difference between expunging the arrest record of a presumably innocent person, and expunging the conviction of a person adjudged as guilty in a court of law” *Pinto*, 1 F.3d, at 1070, and the power to expunge is normally reserved to those cases where “a conviction is somehow invalidated, such as by a finding that it was unconstitutional, illegal, or obtained through government misconduct, a federal court may, in appropriate cases, grant expungement” *Tokoph*, 774 F.3d, 1305. Many circuits accept that they have the power to expunge records where they are legally erroneous, but reject the power to do so otherwise, *cf. United States v. Rowlands*, 451 F.3d 173, 177 (3d Cir. 2006) (“[W]e have jurisdiction over petitions for expungement in narrow circumstances: where the validity of the underlying criminal proceeding is challenged.”), *United States v. Meyer*, 439 F.3d 855, 861-62 (8th Cir. 2006) (“A district court may have ancillary jurisdiction to expunge criminal records in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding”), *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1241 (9th Cir. 2019) (“In short, expungement relief is available under the Constitution to remedy the

alleged constitutional violations.”) *rev’d on other grounds* 142 S. Ct. 1051 (2022), *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) (“Kokkonen forecloses any ancillary jurisdiction to order expungement based on ... proffered equitable reasons [but not necessarily those challenging validity of the action]”), *United States v. Scantlebury*, 921 F.3d 241, 250 (D.C. Cir. 2019) (“The remedy of expungement is available only if necessary to vindicate rights secured by the Constitution or by statute.”) (quoting in part *Abdelfattah v. DHS*, 787 F.3d 524, 536 (D.C. Cir. 2015)). Most recently, the 6th Circuit succinctly described the jurisdictional issues that those circuits having addressed Kokkonen have raised, *United States v. Batmasian*, 66 F.4th 1278 (11th Cir. 2023).

Whilst the Tenth Circuit has never expressly addressed *Kokkonen* in the expunction context, our circuit has, for the past thirty years at least, refused to grant expunctions completely extraneous to some attempt to infirm the proceedings anyway, *cf. United States v. Salgueido*, 256 F. Supp. 3d 1175, 1178 (D.N.M. 2017) (The Tenth Circuit “has held that a court has equitable powers to expunge a conviction only when there is a finding that the conviction was unconstitutional, illegal, or obtained through government misconduct.”) (Internal quotation marks omitted).

We therefore return to where we started – we do not need to explore whether an FTCA *negligence* action – we must not forget that bar a few exceptions, see *e.g. Ingram v. Faruque*, 728 F.3d 1239, 1248-50 (10th Cir. 2013), “the FTCA retains immunity for *intentional* torts” *Frey v. Town of Jackson*, 41 F.4th 1223, 1240 (10th Cir. 2022) – because as we have previously discussed, a jurisdictional exhaustion defect prevents us from adjudicating the FTCA claim anyway. In any case, even if we

pretend, *arguendo*, for a moment that this Circuit does hold (which it does not) that we can issue a general equitable expunction or not, these provisions refer to an *ancillary* power of the *court*. As this Circuit has explained however, “[a] provision for [a judicial act] in a settlement agreement cannot bind the court” *Oklahoma Radio Associates v. FDIC*, 3 F.3d 1436, 1442 (10th Cir. 1993) (quoting *Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir.1991)), and so even even if we assume that an action for specific relief in the form of an expunction is in fact an independent cause of action – something no authority supports – our Circuit otherwise requires us to go the merits of the action, something we absolutely cannot do as a matter of practicality on the strength of a laconic civil complaint and no further information. “Settlement[s] ... are, after all, the creation of the parties and may bear only what force of law a court, in its judgment, will allow.” *Mcclendon v. City of Albuquerque*, 630 F.3d 1288, 1296 (10th Cir. 2011) (citation omitted). Here, we have no means of determining, even supposing we have jurisdiction, whether the expungement entered would otherwise be within the powers of this Court.

Whether or not the DOJ can, of its own initiative, lawfully expunge a record is perhaps the operative question in determining whether or not the agreement will, as a practical matter, be enforceable. We do not and cannot propose to answer it today – that much is a question for the parties to fathom as they, like any other parties to an ordinary contract, find a solution which will allow them to move forward together.

C

We accept that the parties at bar have sought – and we are all the more pleased to hear it – to resolve their differences amicably. This

court's difficulty, however, is that "district courts have an independent obligation to address their own subject-matter jurisdiction" *City of Albuquerque v. Soto Enters., Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017), and it is the Supreme Court's affirmative command that "courts *must* consider them *sua sponte*" *Fort Bend Cty. v. Davis*, — U.S. —, 139 S. Ct. 1843, 1849, 204 L.Ed.2d 116 (2019) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012)) (emphasis added) accord *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17, 199 L.Ed.2d 249 (2017) ("In contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them on their own initiative."). Their agreement on the other hand is one between the parties, and we cannot, because to do so would be in excess of the powers of this Court and cause us to render a void judgment, reserve nonexistent jurisdiction to enforce it, no more than we are able to enter an *ultra vires* decree of expunction. To be sure, the parties will nevertheless be able to bring a breach-of-contract action before the court of competent jurisdiction to hear a contract dispute between them should one – we sincerely hope not – choose to violate the terms of the agreement.

Lastly, whilst we agree that "[i]t is axiomatic that [a] court may not make an agreement for the parties which they did not make themselves" *Mid-America Pipeline v. Lario Enterprises*, 942 F.2d 1519, 1527 (10th Cir. 1991) (quotation omitted), we will not be denying the motion to dismiss by joint stipulation and providing the parties a chance to provide a new settlement agreement to the Court because nothing that they do can give this Court jurisdiction to enforce it. Nevertheless, because our dismissal is on narrow, nonmerits, jurisdictional grounds, the plaintiff is at liberty to relitigate the action

either as a properly brought FTCA action, or as a *Bivens* civil rights action against the officer himself.

* * * * *

Conclusion and Order

In view of the foregoing;

The complaint is **dismissed *sua sponte*** for want of jurisdiction;
and

Any subsequent action, whether against the United States, its agencies, or BLOOXXED, under *Bivens*, the FTCA, or otherwise, arising out of the same facts is **designated** as a similar-and-previously-dismissed action for the purposes of its assignment under local rules;

Any other claim, motion or application is **denied**.

It is so ORDERED,

23rd December 2023

/s/NewPlayerqwerty

CUSDJ